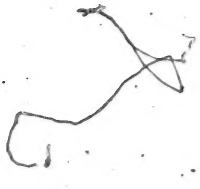

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In the Supreme Court of the United States

October Term, 1970

~~No. 1292~~ 70-75

MOOSE LODGE NO. 107,

Appellant

v.

K. LEROY IRVIS, and WILLIAM Z. SCOTT, Chairman, EDWIN WINNER, Member, and GEORGE R. BORTZ, Member, LIQUOR CONTROL BOARD, COMMONWEALTH OF PENNSYLVANIA

Appeal From the United States District Court for the Middle District of Pennsylvania.

MOTION TO AFFIRM

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MOTION TO AFFIRM

K. Leroy Irvis, an appellee in the above-captioned case, moves to affirm on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final decree of a three-judge District Court declaring invalid the club liquor license issued to appellant by the Pennsylvania Liquor Control Board pursuant to the Pennsylvania Liquor Code and enjoining the Board from issuing any club liquor license to appellant as long as it follows a policy of racial discrimination in its membership or operating policies or practices.

Appellee Irvis brought this action following appellant's refusal to serve him on its premises solely because he is a Negro. Irvis, majority leader of the Pennsylvania House of Representatives, had been taken to appellant's premises as the guest of a member. Pointing to the extensive alcoholic beverage regulatory scheme established by the Commonwealth of Pennsylvania by and under the Pennsylvania Liquor Code, Irvis asserted that the racial discrimination practiced by appellant necessarily bore the attributes of state action. While agreeing that appellant was otherwise a purely private organization and free to engage in such discrimination if it so desired, Irvis contended appellant could not simultaneously enjoy the privilege of holding and using to its benefit a Pennsylvania club liquor license. Accordingly, Irvis asked that the Commonwealth of Pennsylvania be removed from participation in appellant's pattern of racial discrimination by revoking appellant's club liquor license.

The court below agreed with Irvis' characterization of the Pennsylvania alcoholic beverage control system as

one necessarily involving the State in a pattern of discrimination practiced by a club licensee. Dealing with the single question thus presented—whether the State's involvement constituted state action forbidden by the Equal Protection clause of the Fourteenth Amendment—the court below held that it did and granted appropriate relief which eliminated this involvement and left appellant free to adhere to its policy of racial discrimination unencumbered by possession of a liquor license.

ARGUMENT

Apart from the factual context in which this case arises, it presents no novel or substantial feature. For decades this Court has acted to strike down state involvement in racially discriminatory actions of private parties, be the State's participation direct or indirect, central or peripheral. *Shelley v. Kraemer*, 334 U.S. 1; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *United States v. Guest*, 383 U.S. 745. Appellant's attempt to portray the case as one involving only purely private action is not supported by the facts, and its characterizations of the opinion of the court below as doing "irreparable damage to the constitutionally protected rights of privacy and of private association while drawing in the process a wholly unsupportable distinction between racial and religious discrimination" and also as disregarding congressionally established limits to discrimination are misplaced and legally unsupportable.

First: Contrary to appellant's assertion, this case does not involve the question of whether the mere issuance of a liquor license to a private club constitutes "state action." Licensure of private clubs by the Liquor Control Board is part of an intensive and extensive complex liquor control and regulatory system whereby Pennsylvania has chosen to exercise to the fullest its authority in this field.[1] The summary of this system recited by the

[1] Pennsylvania is one of the states in the group known as "monopoly" states. It not only has established an extensive

court below (Appendix to appellant's Jurisdictional Statement, pages A5 to A7) provides only a verbal skeleton to a full-blown State operation which injects the State into every aspect of the conduct and operations of those who deal with it. Less than this was sufficient for this Court to find forbidden governmental involvement in *Public Utilities Commission v. Pollak,* 343 U.S. 451.

Further, the grant of a club liquor license by Pennsylvania to appellant involves more than an administrative grant of authority to perform acts and to enjoy benefits available to the public in general. The relationship between State and licensee can be described as "symbiotic," for the latter thereby obtains a valuable privilege not freely available and the former obtains a source of funds not otherwise present. In so doing, the State has also superimposed a quota on the licensing system so that club licenses are not freely available in localities once the quotas are filled.

These unique features make Pennsylvania's alcoholic beverage control system substantially different from licensing procedures and practices involved in the issuing of a building permit or a driver's license. These, as well as most other governmental licensing activities, apply to the general public, not just to a privileged segment of it, and have been imposed solely for the protection of the general public, not for the benefit of a private organization. Appellant seems to have missed this distinction in its attempt

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regulatory and enforcement system, it also has reserved to itself all aspects of the sale of liquor to the public through a network of State Stores. It has left little to private enterprise and decision.

to cover all regulatory activity under a single principle that excludes the presence of state action. In delineating this distinction, the court below was clearly correct.

Second: In taking out of context a statement by the court below whereby that court attempted to draw an even finer line between what is forbidden and what is not, appellant has certainly distorted what was said and meant. The court said: "Nothing in what we here say implies a judgment on private clubs which limit participation to those of a shared religious affiliation or a mutual heritage in national origin." From this appellant argues the court was sanctioning religious discrimination in a context where it was striking down racial discrimination.

Nothing could be less accurate. The court's statement is a brief conclusion to an issue discussed extensively both in briefs and at oral arguments below, and at no time was it ever even remotely discussed in the context of permitting invidious discrimination by private clubs on religious grounds.

The issue was whether it was constitutionally permissible for a private club, whose good faith *raison d'etre* necessarily involved exclusion of certain religious or ethnic groups, to receive and enjoy a liquor license from the State. Thus, club A, formed for the purpose of promoting and enhancing knowledge and pride in Catholic religious traditions and practices, could validly limit participation to Catholics—*not* just white Catholics or Italian Catholics, but Catholics in general. Thus, club B, formed for the purpose of promoting and enhancing knowledge and pride in Italian traditions and history among Americans of Italian origin, could validly limit participation to

such persons—*not* just white Americans of Italian origin or Catholic Americans of Italian origin, but Americans of Italian origin in general.

This distinction is rooted in what might be termed a reasonable relationship test. If the practiced discrimination is reasonably related to the otherwise valid purposes of the organization, the discrimination itself is valid. Contrast the examples given with appellant's case. Its purposes are set forth in Appendix G (first page of the Constitution) to appellant's Jurisdictional Statement:

> "The objects and purposes of said fraternal and charitable lodges, chapters, and other units are to unite in the bonds of fraternity, benevolence, and charity all acceptable white persons of good character; to educate and improve their members and the families of their members, socially, morally and intellectually; . . . to encourage tolerance of every kind . . .," etc.

Irvis has asked from the outset, and continues to ask, what conceivably valid purpose is served by excluding non-whites from an organization devoted to fraternal, benevolent and charitable activities in a spirit of tolerance of every kind. No answer has been forthcoming, as indeed there is none; and all the court below has done is to contrast appellant's case with those different and valid ones.

Third: Appellant apparently wishes to cover itself with the "private club" exemption contained in section 201(e) of the Civil Rights Act of 1964 although at no time in the history of this case has Irvis relied on this statute or has the issue itself been raised.

There is no such question involved here. The 1964 Act forbids places of public accommodation from discriminating. Private clubs are not places of public accommodation. Appellant is a private club. Hence, it may discriminate. Irvis has never urged otherwise; unlike Congress, which said places of public accommodation must *not* discriminate, Irvis has said only that private clubs in Pennsylvania cannot be aided in their discrimination by the State.

Irvis knows of no case, nor has he ever heard it implied, that Congress, in enacting section 201(e), thereby abrogated a long history of constitutional doctrine forbidding the states (or federal government) from aiding and abetting private invidious racial discrimination. Indeed, it would be a novel position to argue that Congress may legislatively terminate constitutionally required Equal Protection principles.

The Civil Rights Act of 1964 and section 201(e) of that Act, in fact, did nothing in this respect. It left the private club and the state action doctrine exactly where they always were prior to its passage. Private clubs may continue, as always, to discriminate; the state may not be involved directly or indirectly. This case involves no more or less than that; and the 1964 Act is irrelevant.

Fourth: At no time did Irvis point to the particular regulatory provision of the Liquor Control Board (Regulation 113.09, Appendix F, page 148) requiring adherence by a private club to its Constitution and by-laws as a major indication of State involvement here; and he agrees with appellant that the primary purpose of this particular provision is to insure that private clubs are in fact private.

However, the court below did not arrive at its conclusion in this case by relying on this single regulation; and even the most critical reading of its opinion will confirm that its decision would have been the same even were this regulation not present.

Appellant weaves a further argument from this issue and argues that the appropriate remedy would have been to enjoin the Liquor Control Board from enforcing this particular regulation. This argument, unfortunately for appellant, depends upon the regulation's being exactly what it is not—the sole basis for finding state action in the discrimination practiced here. Were the regulation invalidated, all else would remain the same: the appellant would continue to exclude non-whites; and the State would continue to be deeply involved in the discrimination through its licensing, regulatory and monopoly system. Obviously, the same decree would and should issue.

Fifth: Irvis has not sought to limit the right of association of anyone. If individuals, as individuals or in groups, wish to exclude him from their private associations because he is a Negro, he recognizes their right to do so. But a constitutionally protected right of association does not extend its scope to the obtaining of alcoholic beverages within the confines of a racially discriminating private club.

Certainly, Pennsylvania, had it so wished, could have chosen not to permit the purchase and sale of alcoholic beverages within private clubs at all. The consequences for appellant would have been no different. Just as barren a barracks it might be; but the right of association, were

it indeed a valued one to appellant's members, would remain as intact as it remains here in fact. It would be only the voluntary decision of these members that they value the right less than they do the obtaining of a drink that would create any problems for appellant; and Irvis suspects that appellant has "let the cat out of the bag," so to speak, when it admits that the sale of liquor is the economic foundation on which appellant's existence rests (Jurisdictional Statement, page 18). How more involved can Pennsylvania be in appellant's discrimination under these circumstances; how less important can any right of association thus be.

CONCLUSION

The decision of the court below was clearly correct, and appellant has presented no substantial question for the decision of this Court. The judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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February, 1971